SUPREME COURT OF YUKON

Citation: *Knol v. Tamarack Inc.*, 2013 YKSC 27

Date: 20130419
S.C. No.12-AP004
Registry: Whitehorse

Between:

LUCAS KNOL

Petitioner

And

TAMARACK INC.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Lucas Knol	Self-represented
André W.L. Roothman	Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for judicial review of a discharge following a preliminary inquiry on a charge of fraud contrary to s. 380(1) of the *Criminal Code*. Lucas Knol is prosecuting this offence privately. The accused is Tamarack Inc. ("Tamarack"), and

the principle of that company is Tony Beets. The charge arose in the context of a dispute over the ownership of five placer mining claims in the Paradise Hill area near Dawson City, Yukon. One of the claims, named "Dodger 5", is the subject of this proceeding.

[2] Mr. Knol swore the Information charging Tamarack on August 4, 2011. It alleges that Tamarack:

> "on or about the 18th day of April, 2008, Tamarack Inc. did by deceit, falsehood or other fraudulent means defraud Lucas Knol of property, to wit: a mining claim in Dawson City, Yukon Territory, described as Dodger 5, contrary to section 380 (1) of the Criminal Code."

The reason why the charge was limited to only one of the five placer claims at issue is not evident from the record of the preliminary inquiry, but little turns on the point for the purposes of this judicial review.

[3] A summons was issued to Tamarack returnable on October 18, 2011. On January 27, 2012, Tamarack elected to proceed to trial before a Supreme Court judge sitting alone and requested a preliminary inquiry. The preliminary inquiry was held on September 10, 2012, and the decision to discharge the accused was rendered the same day. Mr. Knol filed his petition to quash the discharge on October 9, 2012.

LAW

[4] The Information in this case simply alleges an offence under s. 380(1) of the *Criminal Code*, without specifying whether the prosecution is under either paragraph (a) or (b) of that section. However, the Information is endorsed "Indictment by law" and, as I indicated, the accused was put to its election and elected the mode of trial. Therefore, it would appear that the parties assumed that the prosecution was under s.

380(1)(a) of the *Criminal Code*, being fraud involving property of value exceeding $5000. Fraud under $5000 is an offence in the absolute jurisdiction of the Territorial Court pursuant to s. 553 of the *Criminal Code*.

[5] The essential elements of this charge are that:

1) the accused must have deprived Mr. Knol of something of value;

2) the accused's deceit, falsehood or other fraudulent means caused the deprivation;

3) the accused intended to defraud Mr. Knol; and

4) the value of the property exceeded $5000.

[6] The test for a committal on a preliminary inquiry is whether or not there is "any evidence" upon which a reasonable jury properly instructed could return a verdict of guilty: *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080.

[7] The jurisdiction of a reviewing court on an application to quash a discharge at a preliminary inquiry is very narrow. *Certiorari* does not permit a reviewing court to overturn a decision of the preliminary inquiry court merely because that court committed an error of law or reached a conclusion different from that which the reviewing court would have reached. Rather, in order to overturn a discharge, the reviewing court must be satisfied that the preliminary inquiry judge acted in excess of his or her assigned statutory jurisdiction or in breach of the principles of natural justice: see *R. v. Russell*, 2001 SCC 53, at para. 19.

[8] Accordingly, there must be some evidence of each of the essential elements of the offence in order to justify a committal for trial. Conversely, in order to the discharge the accused, there would have to be a complete absence of evidence of at least one of

the essential elements. Putting it another way, a preliminary inquiry judge commits jurisdictional error where he or she erroneously finds that there is no evidence in respect of an essential element of the offence: *R. v. Sazant,* 2004 SCC 77.

EVIDENCE

[9] On July 30, 1989, Roger Garneau, the registered owner of the five placer claims, apparently signed a document entitled “Transfer of Placer Claims” (the “Transfer”), purporting to transfer 100% of his interest in those claims to Mr. Knol for one dollar. Mr. Garneau is now deceased.

[10] Mr. Knol explained that he acquired the placer claims together with another unnamed individual who had an option to purchase the claims, and whom Mr. Knol described as a “partner”. Mr. Knol also explained that, apparently unbeknownst to him, this partner was heavily in debt. Consequently, the two of them were almost immediately pursued by various creditors in numerous legal proceedings. Thus, Mr. Knol made a strategic decision to keep the placer claims in Mr. Garneau’s name by not registering the Transfer with the Mining Recorder’s Office. Despite this failure to register the Transfer, Mr. Knol indicated that he believed he had ownership of the claims. Accordingly, he paid the annual fees and performed the annual work on the claims, as required by the *Placer Mining Act*, S.Y. 2003, c. 13, (the “*Act*”) in order to keep the claims up to date. There was no further explanation or evidence from Mr. Knol as to whatever became of the unnamed partner.[1]

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[1] Technically, some of this information was in the form submissions during an exchange between Mr. Knol and the preliminary inquiry judge at the end of the proceeding, however it was not objected to by Tamarack's counsel.

[11] On May 29, 1992, Mr. Garneau provided a written Power of Attorney to Mr. Knol authorizing him to do the following with respect to the claims:

> "1. To apply for grouping
> 2. To perform in file assessment work
> 3. To transfer the placer claims I have in the Dawson on Paradise Hill" [as written]

Mr. Knol explained that this made it easier for him to do the necessary work to maintain the claims, since they continued to be registered in Mr. Garneau's name. He explained that he continued to operate the claims in that fashion for the following 20 years, approximately, until the current dispute arose.

[12] Thomas Kennedy, a lawyer and long-time friend of Mr. Knol's, testified that between January and April 2007 he received a call from Mr. Beets who indicated that he was interested in purchasing the subject placer claims. According to Mr. Kennedy, Mr. Beets told him that he was aware that Mr. Knol was the actual owner of the mining claims that were registered in Mr. Garneau's name. Mr. Beets asked Mr. Kennedy to pass his message along to Mr. Knol.

[13] Mr. Knol testified that, upon receiving Mr. Kennedy's message, he telephoned Mr. Beets, who invited him to meet in the summer of 2007 to discuss the matter.

[14] On February 20, 2007, Mr. Garneau signed a document cancelling the Power of Attorney. Mr. Knol testified that he was unaware of this cancellation until he received documentation from the police or the Crown in 2012, in relation to his private prosecution.

[15] On April 26, 2007, Mr. Knol received an email from Mr. Garneau which stated as

follows:

> "Further to our conversation, and letter, payment of 2,500.00 to cover costs etc. must be received by May 12, 2007. Otherwise, other offers will be considered."

[16] On May 4, 2007, Mr. Knol replied with an email to Mr. Garneau asserting that, pursuant to the Transfer, the mining claims belonged to him and not Mr. Garneau. The email also confirmed a subsequent telephone conversation between Mr. Knol and Mr. Garneau in which Mr. Knol asserted that Mr. Garneau stated that he had apparently forgotten about the Transfer and had sent Mr. Knol the email of April 26th because Mr. Beets was after Mr. Garneau to buy the claims. Mr. Knol concluded his email by promising that he would proceed with the registration of the Transfer in the summer of 2007, in order to remove Mr. Garneau's name as the registered owner of the claims.

[17] In July 2007, Mr. Knol said that he met with Mr. Beets, apparently on the latter's mining property, and the two men had a discussion for about an hour about the placer claims registered in Mr. Garneau's name. Mr. Knol claims that he told Mr. Beets that he, Mr. Knol, was not then interested in selling the claims.

[18] Mr. Knol did not register the Transfer with the Mining Recorder's Office in the summer of 2007 and provided no evidence or any explanation as to why that was not done.

[19] On April 18, 2008, Mr. Garneau transferred his interest in the placer claims to Tamarack for $12,500. The transfer document relating to that sale was registered with the Mining Recorder's Office on April 24, 2008.[2]

[20] As I understood his evidence from the transcript of the preliminary inquiry, for the summer mining season of 2008, Mr. Knol flew directly from Frankfurt, Germany to Whitehorse. Ordinarily, he would have flown through Vancouver, where the Transfer was apparently being stored. Mr. Knol then testified that, on July 14, 2008, he went to the Mining Recorder's Office in Dawson City to check on the status of his placer claims and discovered that the claims had been sold by Mr. Garneau to Tamarack.

[21] On July 15, 2008, Mr. Knol wrote a registered letter to Mr. Beets protesting the sale and asserting his ownership in the claims.

[22] On August 5, 2008, Mr. Knol wrote to the lawyer acting as the registered office for Tamarack, again protesting the sale of the placer claims for the same reason.

[23] Mr. Knol attempted to obtain a remedy through the Mining Recorder's Office and through the police, without success.

ISSUES

[24] The issues raised by Mr. Knol in his petition were not particularized and those set out in his written submissions were equally unspecific. Therefore I have attempted to distill the specific questions to be determined on this judicial review from those

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[2] Although there was no specific evidence on the value of the Dodger 5 claim, there is also no breakdown on what the other claims were worth. Furthermore, this issue was not raised at the preliminary inquiry by Tamarack's counsel. Therefore, I conclude that there was some evidence on the essential element that the property Mr. Knol was deprived of was worth more than $5000.

materials together with Mr. Knol's affidavit filed November 19, 2012, and the written submissions filed by counsel for Tamarack. As I see it, the issues are as follows:

1) May I consider the affidavit of Mr. Knol filed August 7, 2009, (which was attached as exhibit A to his affidavit filed November 19, 2012) on this judicial review?

2) Did the preliminary inquiry judge err in failing to consider the case of *Knol v. Levesque*, 2003 YKSC 27, as "evidence" of Mr. Knol's ownership of Dodger 5?

3) Did the preliminary inquiry judge err in admitting into evidence the "Abstract of Record" for Dodger 5?

4) Did the preliminary inquiry judge ultimately fail to recognize the evidence that Tamarack had notice that Mr. Knol had an ownership interest in Dodger 5?

5) Did the preliminary inquiry judge err by considering Mr. Knol's failure to register the Transfer respecting Dodger 5 with the Mining Recorder's Office?

ANALYSIS

1. May I consider the affidavit of Mr. Knol filed August 7, 2009 (which was attached as exhibit A to his affidavit filed November 19, 2012) on this judicial review?

[25] As I understand it, the contested affidavit was filed on August 7, 2009 in support of an earlier attempt by Mr. Knol to commence his private prosecution. Mr. Knol asserted in his affidavit filed November 19, 2012, in support of this application for

judicial review, that at the preliminary inquiry, “I read my Affidavit of August 7, 2009 as evidenced by testimony.” While Mr. Knol may indeed have referred to the August 7th affidavit in preparing for his testimony at the preliminary inquiry, the record of that inquiry does not indicate that he read from the affidavit during his testimony. Consequently, the August 7th affidavit does not form part of the record of the evidence at the preliminary inquiry. Further, Mr. Knol has made no application to consider the affidavit as fresh evidence on this judicial review. Accordingly, it would be inappropriate to consider the affidavit at this time, and I decline to do so.

2. ***Did the preliminary inquiry judge err in failing to consider the case of Knol v. Levesque, 2003 YKSC 27, as “evidence” of Mr. Knol’s ownership of Dodger 5?***

[26] It is trite to say that a court may take judicial notice of case law without that case law being filed as “evidence”. Therefore, the fact that the preliminary inquiry judge declined to accept a copy of this decision as an exhibit at the preliminary inquiry cannot constitute an error of law. In any event, a failure to admit evidence which is otherwise admissible would only be an error of law on the face of the record and not a jurisdictional error: see *R. v. Norgren,* (1975), 27 C.C.C. (2d) 488 (B.C.C.A.).

[27] The more interesting question is whether a finding of fact (or of mixed fact and law) in a previous decision can be used to support a similar finding in a later case, without the need for presenting the same evidence or arguments in the latter case. In other words, can a court take judicial notice of such a finding in a previous case?

[28] The threshold for judicial notice is strict. A court may take judicial notice of facts that are:

1) so notorious or generally accepted as not to be the subject of dispute among reasonable persons; and

2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see *R. v. Find*, 2001 SCC 32.

However, the closer a fact approaches the dispositive issue, the more a court should insist on compliance with the stricter criteria for judicial recognition. In other words, the more a court should be cautious in dispensing with the proof of the fact: see *R. v. Spence*, 2005 SCC 71. Finally, a judge cannot take judicial notice of a fact simply because the fact was established another judicial proceedings: see *R. v. Noel*, 2010 NBCA 28.

[29] *Knol v. Levesque* was an action by Mr. Knol against Mr. Levesque for damages for trespass on two of the five placer mining claims in dispute. The trial judge began his oral memorandum of judgment by stating as follows:

> "The parties are the holders of the adjoining placer mining claims in the Dawson Mining District located on what is known as "Paradise Hill". The plaintiff [Mr. Knol] holds the claims known as "Dodger 4" and "Dodger 5", while the defendant holds, among others, the claims known as "Big Red" and "Caroline". The grant for these claims entitles the holder to the exclusive right to mine them and realize all proceeds therefrom."

While the trial judge went on to repeatedly refer to the Dodger claims as "the plaintiff's claims", and ultimately awarded damages to the plaintiff for the trespass on the Dodger 5 claim, no specific finding of fact was made regarding Mr. Knol's ownership of that claim. In reading the decision as a whole, it seems clear that there was never any issue raised by Mr. Levesque regarding Mr. Knol's ownership of the claims. That may have

had something to do with the fact that, while Mr. Knol was represented by counsel, Mr. Levesque represented himself, and was described by the trial judge as “a man of limited formal education” who “could not read or write”. In any event, there was never any challenge to Mr. Knol’s asserted ownership of the Dodger claims and therefore no need for the trial judge to make any particular finding fact in regard. Rather, with respect, the trial judge seems to have simply assumed that Mr. Knol’s asserted ownership was legitimate.

[30] In these circumstances, *Knol v. Levesque* cannot be held up as a decision previously determining Mr. Knol’s ownership of Dodger 5.

[31] In any event, given that the ownership of Dodger 5 is a central issue in the case at bar, it would have been inappropriate for the preliminary inquiry judge to have taken judicial notice of *Knol v. Levesque* as proof of Mr. Knol’s ownership, and he did not err in refusing to do so.

[32] The last thing I would say on this issue is that there was never any serious challenge to the evidence that, at the very least, Mr. Knol had an equitable interest in Dodger 5 after the execution of the Transfer, in the sense that he was the beneficial owner of the placer claim, if not the legal (i.e. registered) owner.

3. Did the preliminary inquiry judge err in admitting into evidence the “Abstract of Record” for Dodger 5?

[33] Counsel for Tamarack introduced this Abstract of Record into evidence during his cross-examination of Joanne Oberg, the former Regional Manager of the Mining Recorder’s Office. In effect, Ms. Oberg testified that, in transferring a mining claim from one party to another, she would refer to the Abstract to confirm that the transferor

(seller) on the transfer document and the owner of the claim was one and the same person. Mr. Knol objected to the Abstract being entered as an exhibit on the basis that it was not relevant. The preliminary inquiry judge disagreed.

[34] In my view, the preliminary inquiry judge was correct in allowing the Abstract to be entered as an exhibit. The document was both logically relevant and material. It was logically relevant to the issue of the legal ownership of Dodger 5 because it tends to prove or disprove that fact as a matter of logic and human experience: see *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.). The Abstract was also material because the legal ownership of the claim was relevant to the question of whether Tamarack intentionally acted by deceit, falsehood or other fraudulent means.

4. Did the preliminary inquiry judge ultimately fail to recognize the evidence that Tamarack had notice that Mr. Knol had an ownership interest in Dodger 5?

[35] This issue involves the application of ss. 46 and 47 of the *Act*, which state as follows:

> "46(1) The owner of a claim may sell, mortgage or dispose of it if the instrument showing the disposal is deposited in duplicate with a mining recorder.
>
> (2) The mining recorder shall, on the deposit of the instrument referred to in subsection (1), register the instrument and return to the assignee one of the duplicates with a certificate endorsed thereon that the instrument has been recorded in their office, and retain the other.
>
> 47 No agreement affecting the title to any claim, or to any interest in it, is enforceable against any person without notice, unless the agreement or a memorandum of it is in writing, duly signed, and is recorded in the office of the mining recorder."

[36] Mr. Knol took the position at the preliminary inquiry that s. 47 did not apply because Tamarack had notice of Mr. Knol's ownership of Dodger 5 (Transcript, p. 36). On the other hand, Tamarack's counsel took the position that, while Mr. Beets had notice that Mr. Knol "was making some claims" to Dodger 5, in proceeding with the purchase of the mining claim, he had no alternative but to deal with the person who was shown to be the registered owner as per the Abstract (Transcript, p. 34). Counsel further submitted that, as Mr. Knol was aware of Tamarack's interest in purchasing the claim, then he either ought to have registered the Transfer in order to protect his position or he should have sought a civil injunction to prevent the transfer from going ahead without his knowledge (Transcript, p. 35).

[37] Interestingly, there were no submissions by either party with respect to s. 46 of the *Act.* On its face, reading both sections 46 and 47 together would seem to suggest that registration of the transfer document ("the instrument showing the disposal") is a necessary precondition to an effective sale of a mining claim, and by that I mean converting the purchaser's equitable or beneficial interest into a legal (or registered) interest.

[38] These sections were considered in *McRae v. Frooks*, [1911] Y.J. No. 2 (T.C.). In that case, the execution debtor was a placer miner who sold his claim to McRae on June 1, 1910. A formal bill of sale was subsequently drawn up on July 27, 1910, but was not registered with the Mining Recorder until October 10, 1910. In the meantime, on September 12, 1910, the execution creditor deposited a writ of execution with the Sheriff. It appears from the case report that the writ of execution was similarly filed with the Mining Recorder prior to the registration of the bill of sale October 10, 1910.

The issue was whether the sale of the mining claim was protected by a provision in the *Judicature Act*, which stated that a writ of execution in the hands of the Sheriff "shall not take priority to a bona fide sale by the judgment debtor… without actual notice to the purchaser that such writ is in the hands of the sheriff." At para. 13, Craig J. observed that, in s. 46 of the *Placer Mining Act*, there is no time specified for the deposit of the transferring instrument with the Mining recorder:

> "In our Act there is no time limited for the recording [of the transferring instrument] ... The provisions of the Yukon Placer Mining Act provide that a person may sell his claim, provided the instrument is deposited with the Mining Recorder; it does not say when. It further provides that "no agreement affecting the title to any claim shall be enforceable without notice, unless such agreement is registered." I cannot construe that to mean that a bona fide sale, accompanied by actual possession, of a mining claim, is defeated by the prior filing of the writ of [execution] … by the Sheriff."

In coming to that conclusion, Craig J. found it to be significant that there is nothing in the *Placer Mining Act* authorizing the Mining Recorder to accept a writ of execution for filing or registration. That fact, in conjunction with the saving provision in the *Judicature Act* and the fact that the sale was done in good faith, seem to have persuaded Craig J. that the late registration of the bill of sale for the mining claim by McRae was not defeated by the interim filing of the writ of execution. Thus, McRae was allowed to retain ownership of his claim.

[39] What are more significant to me from this decision are the comments by Craig J. about prioritization within the *Placer Mining Act*. At para.13, Craig J. initially refers to the absence of any statutory provisions authorizing the filing writs of execution vis-à-vis

mining claims, but then goes on to address the prioritization of other matters squarely within the four corners of the *Act*:

> "…Priority by filing documents is a purely statutory creation, and, unless I can satisfy myself that the creation of such a priority is clearly established by statute, I am not justified in creating it myself. I cannot interpret the provisions of the Placer Mining Act in that manner. I think, viewing the Act and its proper scope, it relates to documents affecting the claim directly between parties dealing with the claim, and where the claim is specifically and by name designated in the documents, clearly then the Act provides for priorities…" (my emphasis)

[40] The scheme of registering mining claims under the *Act* is a form of "land recordation system", the purpose of which is to give notice of the interests that may exist in any mining claim and to establish a priority system for those interests (A.W. LaForest, *Anger and Hornsberger Law of Real Property*,3d ed., looseleaf (Toronto: Canada Law Book, 2012, at p. 30-2). This is the prioritization referred to by Craig J. in *McRae*. Generally speaking, the basic principle of such a system is that the first registration in time prevails, subject to certain exceptions, one of which is as follows: as between a prior equitable interest and a subsequent legal interest, the holder of the legal interest has priority if the interest was acquired in good faith for value and without notice (LaForest, p. 30-2). Thus, if one fails to register an interest in a mining claim, one does so at the risk of that interest being displaced by a subsequent interest (LaForest, p. 30-5). However, in order for the subsequent purchaser to obtain priority, that person must not only register first, but they must be without notice of the prior unregistered interest. Notice may be actual, constructive or implied. Actual notice is knowledge actually brought home to a party, which can be established either by the party's own admission or by the evidence of witnesses (LaForest, p. 30-6).

[41] If a purchaser of a mining claim fails to deposit the transferring instrument with the Mining Recorder pursuant to s. 46, then that purchaser cannot, under s. 47 of the *Act*, enforce his claim to title against third parties "without notice" of the purchaser's unregistered interest. In other words, to have priority under the *Act*, the purchaser must comply with s. 46. A failure to do so creates the risk that an intervening transfer to another purchaser without notice will take priority. On the other hand, according to *McRae*, there is no time requirement for compliance with s. 46, and the failure to register the transferring instrument with the Mining Recorder does not invalidate the transfer or render it void.

[42] Section 47 effectively codifies in the *Act*, the common law equitable doctrine of notice, under which a person with knowledge of a prior equitable interest takes subject to it. This doctrine was considered by the Supreme Court of Canada in *Canadian Bank of Commerce v. Munro*, [1925] S.C.R. 302. There, the bank was a mortgagee of certain goods, but failed to file a renewal of its mortgage, as required by the Alberta *Bills of Sale Act*. Munro purchased the goods from the mortgagor, knowing that the mortgage was outstanding, but relying upon the bank's failure to file its renewal. The bank subsequently seized the goods under a distress warrant. The issue was whether Munro was a purchaser of the goods "in good faith for valuable consideration" under the *Bills of Sale Act.* At page 6 of 16 (Quicklaw), Anglin C.J.C., held as follows:

> "We find it impossible to accept the view that a purchaser who knows that goods which he is buying belong to a third person and that his vendor has neither title to them nor right to sell them, but, on the contrary, is bound as between himself and such third person to protect the right and title thereto of the latter, and who also knows that any right or title he may acquire by his purchase must be in defeasance of that of such third party, can be said, either legally or

> morally, to be a purchaser "in good faith." He is knowingly taking part in a dishonest dealing. He is assisting his vendor to commit a fraud. He cannot establish in regard to such a dealing that "honesty in fact" which is prescribed by the words "in good faith." Those words import the requisite of honesty in the transaction…" (my emphasis)

Thus, the case confirms the proposition that when one purchases property from another with knowledge that a third party has an interest in the property, and that that interest will be extinguished by the purchase, the purchaser cannot be the said to be acting honestly.

[43] Mr. Knol relies on two pieces of evidence as proof that Tamarack was aware of his interest in the claim before its purchase from Mr. Garneau: (1) the telephone call between Mr. Kennedy and Mr. Beets in early 2007; and (2) the meeting between Mr. Knol and Mr. Beets in July 2007.

[44] With respect to the former, Mr. Kennedy testified at p. 6 of the transcript as follows:

> "… Mr. Beets through our discussion told me that he was aware that Lucas Knol was the actual owner of the mining claims that were registered in the name of Roger Garneau, and Mr. Beets indicated that he was interested in purchasing those claims.…" (my emphasis)

[45] With respect to the latter, Mr. Knol testified at p. 11 of the transcript that in July 2007 he had a meeting with Mr. Beets for about an hour, and that the conversation included the following:

> "… I told him that the claims are – I'm not going to sell it at this point, maybe in the future, but at this point I don't want to sell them. We were talking about the claims that were registered in the name of Garneau. And that was basically it in that conversation…."

[46] Thus, there is evidence that Tamarack had knowledge (i.e. notice) of Mr. Knol's prior unregistered interest in Dodger 5 before purchasing the claim from Mr. Garneau. Therefore, s. 47 of the *Act* arguably does not apply, since Tamarack was apparently not a "person without notice" under the section. However, for the purposes of this judicial review of the decision to discharge, the potential application of s. 47 does not matter. What does matter is whether the evidence of notice was also evidence of Tamarack's dishonesty and intention to defraud in proceeding with the purchase from Garneau. It is apparent from reading pages 31 through 42 of the preliminary inquiry transcript that, with respect to the essential elements of the offence, this was only real issue.

[47] That the preliminary inquiry judge was alive to the issue of notice is evident in the following exchange at p. 31:

> "THE COURT: [addressing Mr. Knol]… So your supposition is, if I can just -- I do not want to put words in your mouth, but that Tamarack, through -- and I am looking again for the name of the individual we talked about, called Kennedy and what was his name again?
>
> MR. ROOTHMAN: Beets
>
> .
>
> THE COURT: Beets. Is it Beets? That he -- they were aware of -- well, they contacted you anyway, but then nonetheless proceeded with Garneau transferring to them, and they went to the Recording Office; is that what you're -- does that summarize your case?
>
> LUCAS KNOL: Yes, that summarize the case, yeah." (my emphasis)

[48] Unfortunately however, the preliminary inquiry judge was less than clear in his reasons as to the impact of this evidence in his deliberations. On the one hand, he

appears to have accepted that this level of knowledge by Tamarack might have raised the case to the level of "civil fraud". If so, then logically then he must have been satisfied that there was some evidence of dishonesty by Tamarack. On the other hand, in discharging the accused, he effectively determined that there was no evidence of dishonesty.

[49] It also appears that the preliminary inquiry judge may have impermissibly engaged in a weighing of the evidence, as indicated by his repeated use of the phrase "sufficient evidence". Weighing the evidence goes beyond the jurisdiction of a preliminary inquiry judge under s. 548(1) of the *Criminal Code*, and usurps the jurisdiction of the trier of fact: see *British Columbia v. Collum*, [1988] B.C.J. No. 1695 (C.A.). While the words "sufficient evidence" are indeed used in s. 548(1) they have been interpreted very narrowly to mean whether there is "any evidence" upon which a reasonable jury properly instructed could convict: see *United States of America v. Shephard,* cited above.

[50] I will quote from some of the more telling passages, starting at p. 40 in the Court's reasons, for the discharge:

> "…[U]sually we often think of these, the task for, in provincial court, in terms of determining matters on a preliminary hearing to be simple and straightforward, and if there is sufficient evidence to send the matter to trial, then, of course, it is the obligation of the Court to commit to trial…
>
> …
>
> … There is of course civil fraud that may be civil in nature; in other words, a fraudulent act that somehow or other defrauds another person out of something of value. It may rise to the level of civil fraud, but another test is whether or not something amounts to fraud that is criminal in nature….

> Yes, and there's a number of elements of criminal fraud as well, in terms of generally inducing someone to act to their injury, or to induce by falsehood or to deceive and by falsehood induce a state of mind which may induce a course of action.
>
> Really, when I look at this case in terms of the criminal context and having balanced all the factors, I have to say, including Mr. Knol's non-registration of the transfer of claim, and I think that is a factor, because -- because after all, as I say, he is urging that what Tamarack did amounted to criminal fraud. And I'm not here to decide this, I'm not -- the test is not that it's -- that it's even shown on the balance of probabilities, but just whether or not there's sufficient evidence on this, that the matter should be committed to trial.
>
> In the end I'm not satisfied… I just do not think the evidence is sufficient to bind this over for a trial of criminal fraud in the circumstances. There are just too many variables and too many aspects of this that suggest that, at the most, it's a civil matter… I'm not satisfied that this meets the test under *Shepherd* [as written] that the evidence is sufficient to commit to trial…" (my emphasis)

[51] In my view, these passages reveal that the preliminary inquiry judge accepted that there was some evidence of Tamarack's dishonesty in its purchase of Dodger 5, but nevertheless discharged the accused. This exceeded his jurisdiction under s. 548 (1) of the *Code*, as he could only discharge Tamarack if there was no evidence upon which a reasonable jury properly instructed could convict. Accordingly, I conclude that he committed a jurisdictional error and I quash the discharge.

5. Did the preliminary inquiry judge err by considering Mr. Knol's failure to register the Transfer respecting Dodger 5 with the Mining Recorder's Office?

[52] As is evident from the above quote from the preliminary inquiry judge's reasons, he considered Mr. Knol's non-registration of the transfer of claim to be "a factor" among those which he "balanced", but then went on to say "I am not here to decide this…" Thus, it is again unfortunately unclear what he meant, although it suggests that he again impermissibly engaged in a weighing of the evidence in determining that there was not "sufficient evidence" to commit the accused to stand trial. In any event, as my conclusion on Issue #4 is dispositive of this *certiorari* application, I do not need to decide the point.

CONCLUSION

[53] I quash the discharge and remit the matter back to the preliminary inquiry judge together with an order of mandamus directing that he commit the accused to stand trial as charged: see *British Columbia v. Collum,* cited above.

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Gower J.